Supreme Court of the United States

October Term, 1943.

No. 712

PATRICK HENRY KELLEY,
Petitioner,

v.

AMERICAN SUGAR REFINING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PATRICK HENRY KELLEY,
Pro se,

DANIEL J. LYNE,
Counsel for Petitioner.

LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Patrick Henry Kelley, (Plaintiff below) prays that a Writ of Certiorari issue to review the judgment of the District Court of the United States for Massachusetts, dismissing the Complaint filed by the Petitioner. The judgment was affirmed by the Circuit Court of Appeals for the First Circuit on November 29, 1943. Jurisdiction is based on Diversity of Citizenship, U. S. Code Title 28, Sec-

tion 41(1). The Complaint alleges that the Petitioner is a citizen of Massachusetts and that the Respondent is a New Jersey corporation conducting a sugar refinery in Boston.

The Respondent, without filing an answer, filed a Motion to Dismiss on the ground (1) that the District Court had no jurisdiction and (2) that even if it had it should decline jurisdiction to interfere with and exercise control over the internal affairs and business of the Respondent. The District Court granted the Motion on the latter ground (2), and entered its judgment dismissing the Complaint without prejudice. The Circuit Court of Appeals affirmed the judgment. The Motion to Dismiss is found in the Record on Pages 13-14. The "Memorandum" of the District Court sustaining the Motion to Dismiss and its Judgment are found on pages 15, 16, 17. The Opinion of the Circuit Court of Appeals is annexed to the Record, Pages 21-27.

Summary and Short Statement of the Matter Involved.

(1) The Complaint alleges, Record, Pages 1 to 3, that the action is based on a Common Law contract made between the Petitioner and the Respondent in New Jersey, to recover a judgment for 24,500 dollars, the value of 200 shares of the Respondent's Common Stock purchased by the Petitioner in 1930, and the certificates for which were issued, registered and delivered in the Petitioner's name as owner by the Respondent for the fully paid par value of 20,000 dollars. That the Respondent was organized under the Corporation Law of New Jersey approved April 7, 1875, with an authorized capital of 90 million dollars, divided into 450 thousand shares of Preferred and 450 thousand shares of Common Stock, each of the par value of $100 per share; that by the statute under which it was organized the

Respondent was authorized to exercise its franchise for a period "not to exceed 50 years"; that the Articles of Incorporation stipulated: "That business was to begin January 10, 1891 and terminate January 10, 1941."

Next it is alleged that in the Certificate of Incorporation it was also stipulated "that the Preferred Stock shall receive an annual cumulative dividend of 7% to be paid semi-annually on January 2nd and July 2nd of each year; *and that "the holders of the Preferred Stock shall be entitled to receive no dividends beyond the seven percentum aforesaid."*

The Complaint alleges that under the law of New Jersey the Preferred Stock was entitled to receive and did receive during the 50-year contract period payments annually, as stipulated, totalling 157,500,000 dollars, paid out of the earnings and surplus profits of the business; the last payment was made on January 2, 1941. That by the terms of the Articles of Incorporation and the law of New Jersey, all undistributed earned surplus profits, arising from the business which had accumulated and had been withheld by the Directors in not distributing it to the Common Stock owners during that period in dividends, was vested in the owners of the Common Stock by the Articles of Incorporation, and that the obligation of the Respondent as above became a fixed obligation on January 10, 1941; that the Respondent and its Directors were prohibited by the law of New Jersey from thereafter using the said earned surplus profits for the payment of dividends on the Preferred Stock under the stipulation in the Articles of Incorporation which provided that the Preferred Stock shall not be entitled to receive any dividends beyond 7 per cent.

Bassett v. U. S. Cast Iron Pipe Co., 75 N. J. Eq. 539.

Day v. U. S. Cast Iron Pipe Co., 95 N. J. Eq. 736.

The contract stipulations are found in Par. 3 of the Complaint, Record, Pages 2 and 3.

The Complaint next alleges (Par. 6, Record, Pages 5, 6) that the Petitioner received a notice in October 1940, that a Stockholders' meeting had been called for November 20, 1940, for the purpose of amending the Certificate of Incorporation by substituting the date "January 10, 1991" for the termination of the business in place of the date "January 10, 1941" which terminated the contract period for which Petitioner invested and thereby risked his capital in the Common Stock.

A copy of the proposed Amendment as drafted and submitted by the Directors and as later accepted by the necessary ⅔ majority vote in value of each class of stock at the meeting held November 20, 1940, is found in the Complaint; Record, Page 6.

The Complaint next alleges (Complaint Pars. 7 to 12 inclusive, Record, Pages 6 to 11 inclusive) that the Petitioner attended the said meeting and voted against the acceptance of the said Amendment; that by the required vote necessary to make it effective the Amendment was adopted by the Stockholders on November 20, 1940, and that immediately thereafter the Respondent as required by the statute in such case provided filed a Certificate of Amendment with the New Jersey Department of State which thereby authorized the Respondent to exercise its franchise from and after January 10, 1941 until January 10, 1991; that upon the filing of the said Amendment in the New Jersey Department of State, the Petitioner immediately notified the Respondent that the contract under which his investment in the Common Stock was made expired by its own terms on January

10, 1941; and that the Respondent would be required to pay the Petitioner the full value of his shares as of January 10, 1941. But that the Respondent thereafter refused to comply with the Petitioner's demand or to recognize his right as above claimed.

The attention of the Chief Justice and Associates is now directed to the fact that the allegations of the Complaint make no attack on the validity of the Amendment to the Articles of Incorporation nor upon the validity of the vote by which it was effected; that the Complaint seeks no remedy, and no aid nor relief against the Corporation nor its officers from the Court under the Equity Jurisdiction and Powers of the Court; that the remedy requested (Par. 6, Record, Page 12) is the Common Law remedy for Breach of Contract to pay a debt, or damages in money, namely, "Wherefore the Plaintiff requests that Judgment for the sum of 24,500 dollars with interest from January 10, 1941 be entered for the Plaintiff against the Defendant."

The Complaint alleges that the Petitioner's right to recover judgment, as above demanded, is based on the following facts, namely: That the plan to amend the Articles of Incorporation contained no provision for the payment and distribution by the Respondent of the undistributed "Earned Surplus" to the owners of the Common Stock pro rata, conditioned upon the ratification and acceptance of the proposed Amendment by the Stockholders; that in the absence of such a provision in the proposed extension of the franchise, all owners of the Common Stock who voted to ratify and accept the proposed Amendment as drafted and submitted by the Directors, *whether they knew it or not*, released, forfeited, and surrendered their contract rights to receive their pro rata share of the undistributed "Earned

Surplus" on January 10, 1941, a fund which was in excess of 10 million dollars and which had accumulated from the annual earnings and profits of the business, the "rights" in which had a cash value of 22 50/100 dollars for each share of Common Stock; the Petitioner's pro rata share in said undistributed "Earned Surplus" being of the value of 4,500 dollars for 200 shares, as shown by the corporate accounts "Consolidated Balance Sheet December 31, 1940," the last item of which is found in the Record on Page 6, namely, "10,142,226.26 Dollars Earned Surplus."

(Note) In answer to the comment in the Opinion by the Circuit Court of Appeals, Record, Pages 26-27, concerning the values shown by the Consolidated Balance Sheet, and the motives of the majority in voting for the Amendment, the attention of the Chief Justice and Associates is directed to the fact that the value of the assets as fixed in the said Consolidated Balance Sheet is computed on the present market or cost value, whichever is the lowest, as of December 31, 1940; *which of course is the liquidation value of the assets on that date.* This fact cannot be disputed as it is so stated in the account (Record, Page 4) items "Marketable Securities" and "Current Assets." As to the Fixed Assets, a sum of 45,205,036.27 Dollars is shown to have been arbitrarily extracted by the Directors from the annual yearly earnings and transferred to a "Reserve Fund for Depreciation and Amortization," created to balance the alleged depreciation by writing down their value, thereby reducing the Fixed Assets by a like amount from 114,607,-141.93 Dollars; and thus reducing the "Earned Surplus" by this expedient from a sum which would have been in excess of 55 million dollars to 10,142,226.26 Dollars, as found in the Consolidated Balance Sheet. See "Total Assets," last item Record, Page 4. By the law of New Jersey the

Corporate Accounts are conclusive evidence on the basis of which the value of the Petitioner's shares must be fixed; in this action, neither the Court nor the Respondent may go behind the Corporate Accounts as kept by the Management in the absence of a claim by the Respondent that the Corporate Accounts as so kept by its Management are fraudulent.

Lick v. U. S. Rubber Co., 39 F. S. 675, Citing the New Jersey Decisions, to the point.

The above sample of Corporate accounting is that usually employed by the managements of strong financial corporations who write their assets down for State and Federal taxation. The comment of the Circuit Court of Appeals referred to was not only contradicted by the facts recited in the "Consolidated Balance Sheet," but it was immaterial and irrelevant.

The Complaint alleges that the proposed Amendment contained no provision which required the distribution and payment of all undistributed "Earned Surplus" to the owners of the Common Stock in the event that the proposed Amendment was ratified and adopted by the necessary ⅔ majority vote in value of each class of stock required to make it effective; that in the absence of such a provision, the proposed plan, if accepted, put the clock ahead for the "termination of the business" from January 10, 1891 until January 10, 1991, and thereby legally operated to stop the "Tolling of the Bell" at the time appointed in the Articles of Incorporation which obligated the Respondent to distribute the said Earned Surplus, with the result that all owners of Common Stock who voted for its adoption, thereby forfeited their right to receive their share of the said fund and thereby permitted it to be used and applied by the

Respondent for all lawful purposes of the corporate Respondent, namely, (1) either the payment after January 10, 1941 of dividends on the Preferred Stock; (2) and the payment of debts contracted from and after January 10, 1941 up to January 10, 1991. And the Complaint alleges in Pars. 7 to 11 as found in the Record, Pages 6 to 10, that by reason of revolutionary changes in conditions which had occurred since January 10, 1891, the ability of the Preferred Stock to earn the dividends required by its contract as made on that date, and so as to leave any adequate return for dividends on the Common Stock had been impaired to such an extent that in the years 1938-1939, the Preferred Stock had failed to earn the dividends paid in those years by 3,200,000 dollars, which caused a deficit which reduced the Earned Surplus by a like amount to the sum as shown in the last item of the Consolidated Balance Sheet December 31, 1940; that whether so intended or not, the proposed Plan, if adopted, thus authorized the Respondent and its Directors to dissipate the entire Earned Surplus Fund of 10,126,226.26 dollars for the benefit of the Preferred Stock from and after January 10, 1941. The Complaint alleges that in such case the proposed plan to amend the Certificate of Incorporation impaired the exclusive right of the Common Stock in the Earned Surplus and was not binding as against the Petitioner who refused his assent and voted against its adoption.

Lonsdale Security Corp. v. International Mercantile Marine Co., 101 N. J. Eq. 554. Leading Case.

The Complaint alleges that the Petitioner had the legal right upon the filing of the amendment under the law of New Jersey to withdraw from membership in the new enterprise and to demand the cash value of his shares as of January

10, 1941, with the status of a creditor in the enforcement of a contract obligation.

Moore v. Splitdorf Electric Co., 114 N. J. Eq. 358 Court of Errors and Appeal.

The proposed Amendment should have contained an option in the alternative by which the owners of the Common Stock who refused to accept it might surrender their shares for their cash value, conditional upon its acceptance by the necessary majority vote required to make it effective. In the absence of such an option, the Petitioner had the legal right to refuse his assent and to enforce the Respondent's obligation by a Common Law action as a creditor to obtain Judgment for their value.

Moore v. Splitdorf Electric Co., 114 N. J. Eq. 358.

Lonsdale Security Corp. v. International Mercantile Marine, 101 N. J. Eq. 554.

Colgate v. U. S. Leather Co., 77 N. J. Eq. 72-96-97.

Revised Statutes of New Jersey 1938, Title 14: "Corporations General; Section 14-2-9, which reads as follows:

Amendment or Repeal of Title: Charter Subject to Discretion of Legislature. Section 14-2-9: "This Title may be amended or repealed at the pleasure of the Legislature and every corporation created hereunder *shall be bound by such amendment.*

"*Such amendment or repeal shall not take away or impair any remedy against a corporation or its officers for any liability which shall have been previously incurred.*" (Italics ours.)

The statute under which the Respondent's franchise was extended provides that the Certificate of Amendment shall be filed in the Department of State and that thereupon—"*The Certificate of Incorporation shall be deemed to be amended* accordingly." "*The Certificate of the Secretary of State that such Certificate has been filed in his office shall be taken and accepted as evidence of such Amendment in all Courts and Places.*" Revised Statutes of New Jersey, 1938 Title 14: Corporations General; Section 14-11-2 Annexed as Appendix "A." (Italics ours.)

The sole and exclusive effect of the statutes authorizing amendment to the Articles of Incorporation is merely to permit the Corporation as a legal entity distinct from its stockholders to do some act or to exercise a power which under the Articles of Incorporation and without such Legislative permission would otherwise be unlawful as against the State; the statute power is not intended in such case to authorize the alteration without consent of the vested rights of stockholders nor take away a remedy by which their contract rights as fixed by the Articles of Incorporation may be enforced.

Grausman v. Porto Rico Tobacco Co., 95 N. J. Eq. 155, 162.

Allen v. Francisco Sugar Co., 92 N. J. Eq. 431.

The filing of the Certificate of Amendment, as alleged in the Complaint Par. 9, Record, Pages 8 and 9, conclusively established the validity of the Amendment and the vote of the Stockholders by which it was accomplished.

Smith v. Eastwood Wire Co., 58 N. J. Eq. 331.

Revised Statutes of New Jersey Title 14: Corporations General, Section 14-11-2, Appendix A.

The right to challenge the validity of the Respondent's franchise is the sole prerogative of the State itself, acting by its legal representative, the Attorney General.

Elizabethtown Gas Light Co. v. Green, 46 N. J. Eq. 118; Affirmed 49 N. J. Eq. 329.

The Opinion of the District Court of the United States.

In the Opinion filed by the District Court sustaining the Motion to Dismiss, "Memorandum" Record, Pages 15, at 16, 17, the Court states: "That the solution of the Plaintiff's rights under the contract involves the internal structure of the defendant and its relation to its stockholders if not its existence as a corporation. *Kelley v. American Sugar Refining Co.*, 311 Mass. 617, 619. The law of New Jersey is readily ascertainable by reference to its published reports but the many vexing questions incidental to the issue raised ought not to be decided by Courts outside New Jersey." "On the authority of *Kelley v. American Sugar Refining Co., Supra*, and *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, the defendant's Motion to Dismiss is granted without prejudice."

Opinion of the Circuit Court of Appeals.

The Court filed its Opinion, affirming the judgment on November 29, 1943. The portion which deals with the discretion exercised by the District Court to decline jurisdiction, Pages 24-26 Record, reads:

"The decision of the district court in declining to exercise jurisdiction was proper. It relied on *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, the leading case on the doctrine of *forum non conveniens*. But the plaintiff argues

that that case by reason of the dissenting opinions therein is no longer controlling. The Supreme Court there said, page 130:

> 'It has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State, but will leave controversies as to such matters to the courts of the State of the domicile.'

"While the strong diversity of opinions throws doubt on the applicability of the doctrine of *forum non conveniens*, to the facts of that case, they leave the rule itself intact for application to a proper case. The considerations which prompted Justice Stone to dissent from the refusal to hear the Rogers case on the merits were that the facts showed fraud on the part of the American Tobacco Co.'s officers in their management of the corporation, as well as the inability of the plaintiff to secure a complete remedy in New Jersey, the domicile of the corporation, in that all the parties were not 'amenable to process' in New Jersey whereas they were amenable in New York where the case was brought. He said, page 147:

> 'In New York also the individual defendants and the trust company can be reached by injunction *pendente lite*, restraining the transfer to innocent purchasers of the stock, certificates for which are already issued and in the hands of the trust company. Under the circumstances of this case, only considerations of more compelling force than the possibility of inconsistent decrees should lead a forum, convenient in so many respects, to decline jurisdiction.'

And Justice Cardozo, also dissenting, said, page 151:

> 'The doctrine of *forum non conveniens* is an instrument of justice. Courts must be slow to apply it at the instance of directors charged as personal wrongdoers,

when justice will be delayed, even though not thwarted altogether, if jurisdiction is refused. At least that must be so when the wrong is clearly proved. The over-mastering necessity of rebuking fraud or breach of trust will outweigh competing policies and shift the balance of convenience.'

"In the instant case, we have no such conditions as led to the dissents there. No fraud or other such inequitable conduct on the part of the defendant is here involved, nor can this court afford the plaintiff a more adequate remedy than the courts of New Jersey. On the other hand, strong reasons for the application of the doctrine are here present. *A decision on the merits rests not on common law but on the construction of several of the New Jersey corporation statutes from that of 1875, under which defendant was incorporated, down to* that of 1937. The question involved, which rests on those statutes and the decisions thereunder, is novel, complicated and difficult. (Italics ours.)

"The basis of plaintiff's determination to vote against the continued existence of the corporation was his belief that the prospective earnings value of his shares was less than their book value. Those who voted for the continued existence of the corporation might have come to the same conclusion that he did. But they might well have been led so to vote because of the realization that the liquidation value, should the corporate existence terminate, would have been far *less than the prospective earnings value*. If that be the case, to allow the plaintiff to recover the book value which he seeks would be to allow him to take from the corporation a far greater share of the assets than his true proportionate interest. Hence a judgment for the plaintiff, if judgment be for the plaintiff at all, would require the ascertainment of methods of computing liquidation value,

which problem would be much better left to the courts of New Jersey." (Italics ours.)

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 347 (a) which provides that the Judgment in any case Civil or Criminal entered in the Circuit Court of Appeals, may be reviewed by this Court upon the Petition of any party thereto to require by Certiorari after Judgment by such Court that the cause may be certified to this Court for determination by it, with the same power and authority and with like effect as if the cause had been brought to this Court by unrestricted appeal.

Statutes Involved.

The Statutes of New Jersey involved are, namely:

(A) Revised Statutes of New Jersey 1938; Title 14; "Corporations General"; Section 14-11-2.

(B) R. S. of New Jersey 1938; Title 14: Corporations General; Section 14-2-9. Section 14-2-9 is set forth in the Petition on Page 9, Section 14-11-2 is annexed to the Petition as Appendix A.

Questions Presented.

The questions presented are essentially fundamental and basic, namely:

(1) That the District Court of the United States sitting as a Court of Common Law had no lawful discretion which could authorize it under its Common Law jurisdiction to

deprive the Petitioner of the right to institute, to maintain, and to prosecute this Complaint by the Common Law process of a Trial by Jury in order to procure a verdict and judgment against the Respondent for 24,500 Dollars as claimed by the Complaint; that the rights as above claimed were secured to the Petitioner by the 7th Amendment to the Federal Constitution and the Act of Congress conferring original jurisdiction of Common Law actions on the District Courts of the United States. That the Complaint sought no aid nor relief outside the Common Law, under the Equity Jurisdiction of the District Court, that the Complaint made no request nor required that the Court issue any order, injunction or decree, or otherwise to take any action which could lawfully operate to interfere with the right of the Respondent to control and manage its internal affairs, and that the Judgment dismissing the Complaint is an arbitrary usurpation of power prohibited by the 7th Amendment to the Federal Constitution and unauthorized by the Act of Congress enacted to preserve the right to a Common Law remedy, namely, the Verdict of a Jury and Judgment by due process of law.

(2) That the Supreme Court of the United States has repeatedly declared that the decisions of the State Courts which establish the public policy of the several States in the exercise of their jurisdictions, is immaterial, irrelevant and incompetent as authority to restrict, enlarge or control the jurisdiction conferred on the District Courts of the United States by Acts of Congress. That the case of *Kelley v. American Sugar Refining Co.*, 311 Mass. 617 on the authority of which the Judgment is based is incompetent and irrelevant as an authority to sustain the Judgment of the District Court in dismissing the Complaint.

(3) That the Action and Complaint filed in the District Court is an Action of Contract to recover a Common Law Judgment by the Petitioner, based on the law of New Jersey and on the individual right of the Petitioner, to obtain a judgment for money against the Respondent; that by the law of New Jersey the right of action alleged in the Complaint is a Transitory Right of Action and the Respondent, as declared by the Courts of New Jersey, enjoyed no exemption from liability to be prosecuted by the Petitioner in any State where it could be found; that the law of New Jersey, as above stated, is also the law as established by the decisions of the Supreme Court of the United States, whereas and to the contrary the doctrine of *Forum Non Conveniens* as interpreted and applied by the Courts of Massachusetts to Transitory Actions against so-called Foreign Corporations to obtain a Common Law Judgment for money has been criticized and declared unsound by the Supreme Court of the United States in *Dennick v. Central R. Co.*, 103 U. S. 11, 21; 26 L. E. 439-442; and also in *Barrow Steamship Co. vs. Kane*, 170 U. S. 100; 42 L. E. 694. The Petitioner contends further that the decision in *Kelley v. American Sugar Refining Co.*, 311 Mass. 617, is in conflict with the Full Faith and Credit Clause, Art. 4, Sec. 1 of the Federal Constitution, and that the doctrine as applied in that decision is in conflict with the decision in *Broderick v. Rosner*, 294 U. S. 629, 71 L. E. 1160, and ought not to be accorded recognition in the Federal Courts.

(4) That the Doctrine applied in *Rogers v. Guaranty Trust Co.* 288 U. S. 123, namely, that Courts will not by injunction or otherwise interfere with the control over the internal affairs of a corporate defendant organized in a State outside that in which the Court is sitting, was

applied in that case under the Equity Jurisdiction and power of the District Court in New York sitting as a Court of Equity as authorized and invoked by the allegations of the Bill and Prayers for Relief; that the said decision is not authority which can be used to sustain the judgment dismissing the Complaint, because the District Court under the allegations of the Complaint and the request that a judgment for 24,500 Dollars be entered against the Respondent, had no lawful power nor jurisdiction sitting as a Court of Common Law to take any action which could interfere with the Respondent's right to control its internal affairs.

(5) That the refusal of the District Court and the Circuit Court of Appeals to ascertain and apply the decisions of the Courts of the State of New Jersey and its applicable statutes, by which the right of the Petitioner to a judgment for 24,500 dollars was established, as alleged in the Complaint, is in conflict with the decisions of the Supreme Court of the United States, by which the said Courts are required to ascertain and determine the Petitioner's right to obtain a judgment against the Respondent by the law of New Jersey and the Rules of Decision, Section U. S. C. A. 725 and as applied in the decision in *Erie R. Co. v. Thompson*, 304 U. S. 64, 82.

(6) That the judgment of the District Court as affirmed by the Circuit Court of Appeals was entered in violation of the Petitioner's right to a trial by due process of law, as secured by the 5th Amendment to the Federal Constitution which required that the District Court should determine the Petitioner's right to a trial and judgment as based on the allegations of the Complaint; whereas and to the contrary the District Court refused the Petitioner

a hearing and trial on the aliegations of the Complaint and exercised its jurisdiction and powers as a Court of Equity as based on the allegations of the Motion to Dismiss, filed by the Respondent as the adverse party, and thereby deprived this Petitioner of a hearing and trial on the Complaint without due process of law in violation of the 5th and 7th Amendments of the Federal Constitution.

Reasons Relied On for the Allowance of the Writ.

The Writ should be allowed because the action of the District Court in entering a Judgment Dismissing the Complaint and the allowance of such judgment by the Circuit Court of Appeals is revolutionary in character, because in conflict with all applicable decisions of the Supreme Court of the United States and with all the decisions of the Courts of New Jersey. The Petitioner contends that no authority at present exists and can be found which will support and sustain the ground on which the judgment is based, namely, that the entry of a Common Law Judgment for money against the Respondent will interfere with the control by the Respondent of its internal affairs; that the conclusion of the District Court and Circuit Court of Appeals to the contrary is an obvious impossibility.

Conclusion.

For the reasons assigned as above and as elaborated in the brief filed herewith, your Petitioner prays that a Writ of Certiorari be issued under the Seal of this Court directed to the Circuit Court of Appeals for the First Circuit to the end that the cause may be reviewed and determined by this Court and that the judgment of the Dis-

trict Court as affirmed by the Circuit Court of Appeals be reversed and that the Petitioner may have such further relief as may to this Court seem proper.

Respectfully submitted,

PATRICK HENRY KELLEY, *Pro se.*
DANIEL J. LYNE,
Counsel for Petitioner.

APPENDIX.

Revised Statues of New Jersey 1938, Title 14: Section 14-11-2 Corporations General

Chapter II. Amendments, Changes or Alterations

14:11-2. Procedure. The board of directors shall pass a resolution declaring that such amendment, change or alteration is advisable and calling a meeting of the stockholders to take action thereon. The meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days' notice given personally or by mail.

If two-thirds in interest of each class of stockholders having voting powers shall vote in favor of such amendment, change or alteration, the corporation shall make a certificate thereof under its seal and the hands of its president or vice president and secretary or assistant secretary, which certificate shall be acknowledged or proved as in the case of deeds of real estate, and shall be filed in the office of the secretary of state.

Thereupon the certificate of incorporation shall be deemed to be amended accordingly, except that such certificate of amendment, change or alteration shall contain only such provision as it would be lawful to insert in an original certificate of incorporation made at the time of making such amendment, change or alteration.

The certificate of the secretary of state that such certificate has been filed in his office shall be taken and accepted as evidence of such amendment, change or alteration, in all courts and places.

(11)

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Preliminary Statement.

For a statement of the grounds on which the jurisdiction of this Court is invoked, and a "Statement of the Case", reference is hereby made to the Petition on file herein, Pages 2-11.

Specification of Errors Intended to be Argued.

(1) That the decision in *Kelley v. American Sugar Refining Co.*, 311 Mass. 617, applied by the District Court as authority to sustain the judgment dismissing the Complaint is immaterial, irrelevant and incompetent to restrict or con-

trol the exercise of jurisdiction by the District Court over the Complaint as conferred by the Act of Congress, U. S. Code Title 28, Section 41:(1).

(2) That under the 7th Amendment to the Federal Constitution, the Petitioner had the right to institute, to maintain and to prosecute to a final judgment in the District Court the Complaint and the remedy sought by the mode and process provided by the Common Law, namely, "the right of Trial by a Jury"; that the District Court sitting as a Court of Common Law under jurisdiction as authorized by U. S. Code Title 28, Section 41:(1), (the jurisdiction that was authorized and invoked by the allegations of the Complaint and the remedy sought) had no jurisdiction nor power to issue an injunction nor otherwise take any action under the Equity Jurisdiction of the Court, to restrain the Respondent from exercising control over the management of its internal affairs; that the judgment dismissing the Complaint by the assumption and usurpation of jurisdiction and power as a Court of Equity denied the Petitioner the right of a Common Law trial and a Common Law remedy as secured by the 7th Amendment of the Federal Constitution.

(3) That the equitable jurisdiction and doctrine exercised and applied by the Court in *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, was authorized by the allegations of the bill and the prayers for relief as sought by the Bill of Complaint filed in that case. That neither the allegations of the Complaint nor the remedy sought, invoked the exercise by the District Court of jurisdiction and power as a Court of Equity; and that the decision in *Rogers v. Guaranty Trust Co., supra* as applied by the District Court was unauthorized and in conflict with the provisions of the 7th Amendment to the Federal Constitution.

(4) That the judgment of the District Court was entered in violation of the Petitioner's right to a trial by due process of law, as secured by the 5th Amendment to the Federal Constitution, which required that the District Court should determine the Petitioner's right as set forth and described in the Complaint, by the allegations of the Complaint itself and the remedy sought; whereas and to the contrary the District Court refused the Petitioner a Hearing Trial, and determination of his rights as based on the allegations of his Complaint, and exercised its jurisdiction and power as a Court of Equity by ignoring the allegations of the Complaint and exercising its jurisdiction and power as invoked by the allegations made by the Respondent, the adverse party, in its "Motion to Dismiss", and thereby deprived the Petitioner of a Hearing and Trial of his Complaint by due process of law as secured both by the 5th and 7th Amendments to the Federal Constitution.

(5) That the Doctrine of "*Forum Non Conveniens*" as applied in *Rogers v. Guaranty Trust Co.*, 288 U. S. 123 and as applied to the Complaint filed by the Petitioner, does not authorize the District Court to apply that doctrine to a Complaint when the sole relief and remedy claimed is a judgment for money based on a breach of the contract made between the Petitioner and the Respondent; that the judgment of the District Court to the contrary is in conflict with the provisions of the 7th Amendment and the principles on which the decisions in *Hartford Life Ins. Co. v. Douds*, 261 U. S. 576 and *Broderick v. Rosner*, 294 U. S. 629; 71 L. E. 1100 are based.

(6) That the refusal by the District Court and the Circuit Court of Appeals to ascertain and apply the decisions of the Courts of New Jersey and the applicable statutes of

that State in the determination of the Petitioner's substantive rights as claimed by the Complaint, is in conflict with the decisions of the Supreme Court of the United States and the Rules of Decisions, Section U. S. C. A. 725, as interpreted and applied in the decision in *Erie R. Co. v. Thompson*, 304 U. S. 64, 82.

(7) That the decision in *Kelley v. American Sugar Refining Co.*, 311 Mass. 617, as applied by the District Court, as authority to dismiss the Complaint ought not to be accorded any recognition as authority by the Federal Courts, inasmuch as the said decision is in conflict with the Full Faith and Credit Clause, Art. 4, Sec. 1, of the Federal Constitution as interpreted and applied by the Supreme Court of the United States in *Broderick v. Rosner*, 294 U. S. 629; 71 L. E. 1100.

Argument and Citation of Authorities.

The attention of the Chief Justice and Associates is directed to the following matter, namely, that by reading the "Opinion of the Circuit Court of Appeals", it would be impossible to discover that any issues concerning the rights claimed by the Petitioner and based on the 7th Amendment to the Federal Constitution, and other issues which attacked the validity of the judgment of the District Court and as raised by the questions now presented by the Petition for Certiorari, had ever been brought to the attention of the Circuit Court of Appeals when the motion to dismiss was argued before that Court. That Opinion, it will be seen, is for the greater part devoted to an argument intended to show that the Opinion and Decision of the majority in *Rogers v. Guaranty Trust Co.*, 288 U. S. 123 would in the Opinion of the Circuit Court of Appeals be sustained if the

same facts and issues were again brought before this Court for a decision. The prominence given to this question and the manner in which it has been handled would lead one to believe that the question was of importance to a correct decision of the Petitioner's rights as based on the Complaint; whereas it was entirely irrelevant insofar as the validity of the judgment of the District Court was involved by the grounds on which it was attacked in the brief filed by the Petitioner in the Circuit Court of Appeals.

The Circuit Court of Appeals found it more convenient to discuss the decision in the *Rogers* case and to ignore, step aside, by-pass, and suppress, all mention of the real major issues which with supporting decisions the judgment of the District Court was attacked at the hearing of the Motion to Dismiss in the Court of Appeals.

The Circuit Court of Appeals makes no attempt by anything original to support the majority decision, other than by an oblique argument intended to show that the Dissenting Opinion of Justice Stone in that case has not been adopted in later decisions.

The Petitioner now suggests that the majority decision in *Rogers v. Guaranty Trust Co., supra* is based on the implied assumption, namely, that the bill filed by the Petitioner stated a good ground for equitable relief under the law of New Jersey as against the 525 employees of the American Tobacco Co. who were allottees of shares, which the bill sought to have cancelled although not named as parties, nor within the jurisdiction of the New York Court. It was by indulging in the above assumption, namely that the bill stated a case against those 525 employees, that the majority decision sustained the judgment

dismissing the bill on the ground that the New York District Court could not reach the said allottees by service of process; that the New Jersey Courts by substituted service could get jurisdiction as it had jurisdiction over the subject matter because of the situs of the stock in that State. Your Petitioner contends that if the bill filed in New York had been filed in the New Jersey Chancery that the Chancery Court would have dismissed it against all allottees who were actual "employees" and not officers of the Corporation because of want of equity; and that the bill stated no ground for equitable relief by the Corporation as against any allottees who were actual "employees"; that the bill might have been retained in such case as against all officers of the Corporation. The above result would follow from the fact that by the law of New Jersey the Corporation is the legal representative of the majority that voted to adopt the plan to allot shares to the "employees" as authorized by the statute; that the Corporation and the said majority had full knowledge that the Statute and the plan authorized the allotment of shares to "employees" before the plan was adopted by the required vote of the stockholders. In such case the Chancery of New Jersey would dismiss the Bill for Relief on behalf of the Corporation as against the employees as stating no ground for equitable relief and for want of equity, and if it retained it all it would have done so as against the officers who were alleged to have enriched themselves by allotments which were not disclosed to the stockholders before the stockholders voted for the acceptance of the plan. As the bill was filed by Rogers as Plaintiff on behalf of the Corporation, and not based on his individual rights, his right to relief depended on the right of the Corporation to the relief sought; by this view the Opinion of Justice Stone stands on solid foundation; because, assuming that the

bill would not have been sustained as against the employees by the New Jersey Chancery, there was no necessity for the New York Court to dismiss the bill for want of jurisdiction over shares allotted to the employees, by the Corporation, the stockholders, and the officers.

We next direct the attention of this Court to certain misrepresentations concerning the Petitioner's case as stated in the Opinion of the Circuit Court. The opinion states at Page 26 Record, "The basis of the Plaintiff's determination to vote against the continued existence of the corporation was his belief that the prospective earnings value of the shares was less than their Book Value". This statement is contradicted by the allegations of the Complaint, which states that the Petitioner was given no opportunity to vote for the continued existence of the corporation except on the condition that he surrendered his exclusive right of the value of 4500 dollars in the earned surplus; that the proposed Amendment contained no provision for its distribution conditional upon the acceptance of the Amendment by the vote of the ⅔ majority necessary to make it effective; that Petitioner refused to surrender his right to the accrued profits earned by his shares because the Amendment as drafted by the management upon such surrender by the Petitioner by voting in favor of the Amendment, thereby authorized the earned surplus to be used to pay dividends on the Preferred Stock after January 10, 1941, as it had been used in 1938 and 1939, and thus the entire earned surplus could be dissipated for the sole benefit of the Preferred Stock; that because the proposed Amendment contained no option permitting its acceptance by the owners of the Common Stock without the forfeiture of rights in the earned surplus, that the Petitioner refused his assent and stood on his legal rights as

fixed by the Articles of Incorporation under which his investment in the Common Stock was made. *Lonsdale Security Corp. vs. International Mercantile Marine Co.,* 101 N. J. Eq. 554.

The next misrepresentation of the Petitioner's case is found in the Opinion, Record Page 26, namely, "The Plaintiff's contention that this suit being one on a Contract does not involve the internal affairs of a Foreign Corporation is without merit. *Cohen v. American Window Glass Co.,* 126 F (2) 111 C. C. A. 2nd 1942".

The action described in the Complaint is based on a written contract to recover a Common Law Judgment for money as damages for its breach. There are no allegations in the Complaint seeking the aid of a Court of Equity—nor requesting the Court to issue any injunction or otherwise take any action to interfere with or control the internal affairs of the Respondent. To the contrary, the case of *Cohen v. American Window Glass Co., supra* was a Bill in Equity requesting the appointment of a Receiver and for the dissolution and winding up of a Pennsylvania Corporation filed in the District Court of New York; and it sought to charge the Directors for the payment of dividends illegally paid. In the argument and citations which will follow, it will be shown that the Petitioner's contention will have the merit at least of being supported by applicable decisions of the Supreme Court of the United States which were ignored by the Circuit Court of Appeals, while the position of the Circuit Court of Appeals in affirming the judgment will have no such foundation to support it, except the legal heresies involved in the judgment of the District Court which were adopted by the Circuit Court of Appeals by ignoring the remedy sought in the Complaint and transformed and converted a common law

action to obtain a Common Law Judgment for money into a Bill in Equity to enjoin the Respondent from exercising control over its internal affairs. The effect and operation intended by the Circuit Court of Appeals in affirming the judgment of the District Court under the above circumstances is an attempt to compel the Petitioner to submit his legal rights to the discretion exercised by the District Court as a Court of Equity, in violation of the Petitioner's rights as secured by the 5th and 7th Amendments to the Federal Constitution and the statute under which the Common Law jurisdiction of the District Court was invoked by the Petitioner.

Argument of the Questions Presented in the Petition for Writ of Certiorari.

Point 1.

The 7th Amendment provides, "In suits at Common Law where the value in controversy shall exceed Twenty Dollars, the right of Trial by Jury shall be preserved". The phrase "Common Law," as found in the above provisions, is used in contradistinction to Equity Jurisdiction; it applies to rights and remedies purely legal and such as it is proper to ascertain in Courts of Law by the appropriate modes and proceedings of Courts of Law.

Shields v. Thomas, 18 How. 253; 15 L. E. 368.
Parsons v. Bedford, 3 Pet. 432, 446; 7 L. E. 732-736.

Point 2.

The provisions of the 7th Amendment preserve the right of Jury Trial against any infringement by any department of the Government and *prohibits all Courts of the United States from exercising jurisdiction in equity where the*

remedy is adequate and complete at law. The right to a Common Law trial in suits at Common Law does not depend either on *legislative or judicial discretion.* This provision *prohibits the Courts of the United States from the exercise of Equity Jurisdiction, and discretion over suits at Common Law.*

Smith v. American Nat. Bank, C. C. A. 89, Fed. Rep. 838.

Hodges v. Eaton, 106 U. S. 408; 27 L. E. 169, 171.

Whitehead v. Shattuck, 138 U. S. 146; 34 L. E. 873-874.

Van Norden v. Morton, 99 U. S. 378; 25 L. E. 453.

Smith v. Bourbon County, 127 U. S. 105; 32 L. E. 73, 76.

Cates v. Allen, 149 U. S. 451; 37 L. E. 804.

Springville v. Thomas, 166 U. S. 707; 41 L. E. 1172.

Scott v. Armstrong, 146 U. S. 499; 36 L. E. 1059-1064.

Security Trust Co. v. Black River Bank, 187 U. S. 211; 47 L. E. 147-158.

Johnson v. Langford, 245 U. S. 541; 62 L. E. 460, 463.

Re Sawyer, 124 U. S. 200, 209, 210; 31 L. E. 402, 405.

Scott v. Neeley, 140 U. S. 90.

POINT 3.

The judgment of the District Court as affirmed by the Circuit Court of Appeals is void as a usurpation of equity jurisdiction exercised on the alleged authority of *Rogers v. Guaranty Trust Co.,* 288 U. S. 123. The jurisdiction in the *Rogers* case above cited was exercised by the Court as invoked by the Prayers for Equitable Relief requested by

the Plaintiffs in their Bill in that case; but the District Court had no jurisdiction in Equity over the Complaint which invoked the Common Law Remedy preserved by the 7th Amendment, namely a judgment for 24,500 dollars against the Respondent as requested by Par. 15 of the Complaint. (Record Page 12.) The Complaint sought no relief outside the Common Law.

Re Sawyer, 24 U. S. 200, 209, 210; 31 L. E. 402, 405.

Whitehead v. Shattuck, 138 U. S. 146; 34 L. E. 873 Headnote 2; Headnote 3.

Smith v. Bourbon County. 127 U. S. 105; 32 L. E. 73.

Van Norden v. Morton. 99 U. S. 378; 25 L. E. 453.

Oates v. Allen, 149 U. S. 451; 31 L. E. 804.

Springville v. Thomas, 166 U. S. 107; 41 L. E. 1172.

Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211; 41 L. E. 147 at 158.

Scott v. Armstrong, 46 U. S. 499; 36 L. E. 1059-1064.

Johnson v. Langford, 245 U. S. 541; 62 L. E. 460, 463.

Smith v. American Nat. Bank, C. C. A. 89 Fed. Rep. 838.

Scott v. Neeley, 140 U. S. 109.

POINT 4.

The decision in *Kelley v. American Sugar Refining Co.*, 311 Mass. 617, is irrelevant and incompetent as an authority to restrict, enlarge or otherwise control the jurisdiction of the District Court under U. S. Code Title 28; Section 41(1) as invoked by the Complaint.

Barrow Steamship Co. v. Kane, 170 U. S. 100, 109, 112.

Pusey & Jones Co. v. Hansen, 261 U. S. 491; 67 L. E. 763.

Terrall v. Burke Construction Co., 257 U. S. 529, 531, 532.

Penn General Casualty Co. v. Comm. of Pennsylvania, 294 U. S. 189, 196, 197; 79 L. E. 850, 856.

Neves v. Scott, 13 How. 268; 14 L. E. 140, 142.

McClellan v. Garland, 217 U. S. 268, 281, 282; 54 L. E. 761-767.

Shaun v. Terry, 36 F. 337, 355.

Watertown v. Canal L. B. & T. Co., 215 U. S. 33, 44, 45.

Klein v. Burke Construction Co., 260 U. S. 226, 234; 67 L. E. 226-232.

Farrell v. Stoddard, 1 F. (2) 802.

POINT 5.

The District Court and the Circuit Court of Appeals refused to ascertain and apply the law of New Jersey to determine the Petitioner's rights, on the ground that the questions involved were novel, complicated and difficult; such grounds are insufficient and incompetent to authorize the judgment dismissing the Complaint over a Common Law Action to obtain a judgment for money based on breach of a contract.

Erie R. Co. v. Tompkins, 304 U. S. 64, 82.

Ruhlin v. N. York Life Ins. Co., 304 U. S. 202, 208, 209.

Fidelity Union T. Co. v. Field, 311 U. S. 169-177.

West v. A. T. & T. Co., 311 U. S. 223, 236.

The following extract is from the opinion in *Meredith v. Winter Haven*, 64 Supreme Court Reporter 7; 88 Supreme Court Law Ed. Adv. Op. 1, at page 12 of the Su-

preme Court Reporter, and at page 6 of the Law Ed., Adv. Op.:

> "*Erie R. Co. v. Tompkins*, 304 U. S. 64 82 L. E. 1188; 114 A. L. R. 1487, *supra*, did not free the Federal Courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction which Federal laws do not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest Court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

Point 6.

The judgment dismissing the Complaint illegally converted an action at law into a Bill in Equity to restrain the Respondent from exercising control over its internal affairs as alleged by the adverse party, in its Motion to Dismiss. The Petitioner could not be compelled by this expedient to submit his legal rights to the discretion exercised by the District Court as a Court of Equity.

Broderick vs. Rosner, 294 U. S. 629, 71 L. E. 1100.

Norton vs. Larney, 266 U. S. 511, 516; 69 L. E. 413-416.

Flanders vs. Coleman, 250 U. S. 223; 63 L. E. 948.

Fair vs. Kohler Die Co., 228 U. S. 522, 525; 57 L. E. 716, 717.

Metcalf vs. Watertown, 128 U. S. 586.

Alabama S. S. R. Co. vs. Thompson, 200 U. S. 206, 216, 217, 218; 50 L. E. 441, 446, 447.

POINT 7.

A Common Law Judgment for money entered against the Respondent by a trial on the merits, cannot operate to interfere with the control by the Respondent over its internal affairs. That question is foreclosed.

Hartford Life Insurance Co. v. Douds, 261 U. S. 476, 478, 479; 67 L. E. 754, 756.

The following is from the Opinion (McReynolds, J.) at page 479; 67 L. E. 756:

> "By a written contract Petitioner had agreed that no monthly assessment should exceed 2.68 dollars per thousand: it demanded and received more, and respondent sued to recover the excess; all parties came before the Court; the necessary facts were established and he obtained judgment for a definite sum of money. *This cannot interfere with the management of the company's internal affairs.*"

POINT 8.

The defense raised by the Motion to Dismiss which was sustained by the District Court and the Circuit Court of Appeals is denounced by the Courts of New Jersey as fraudulent.

The filing of the Certificate of Amendment as alleged by Par. 9 of the Complaint Record, Page 9, and the Certificate of the Secretary of State that such Certificate had been filed in his office is made conclusive evidence (by the Statutes) in all Courts of the right of the Respondent to exercise its franchise as amended until January 10, 1991. The Judgment of the District Court is based on the claim "that the determination of the Petitioner's right to enforce the

Respondent's contract obligation 'involves the validity of the Respondent's existence as a corporation and the validity of the vote by which it was effected'." The New Jersey Court to the contrary holds "that when power is conferred by a statute to be exercised under stated conditions and it is exercised by complying therewith—that it is a fraud on the statute to seek to escape from legal contract obligations by a defense which assumes its invalidity as exercised and conferred by the statute".

U. S. Industrial Alcohol Co. v. The Distilling Co., 89 N. J. Eq. at 179.

Conclusion.

For the reasons above stated it is respectfully submitted that a Writ of Certiorari should issue.

PATRICK HENRY KELLEY, *Pro Se,*
DANIEL J. LYNE,
Counsel for Petitioner.

(12)

No. 712

Supreme Court of the United States.

OCTOBER TERM, 1943.

PATRICK HENRY KELLEY, PETITIONER,

v.

THE AMERICAN SUGAR REFINING COMPANY,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

JOHN L. HALL,
RICHARD WAIT,
Attorneys for respondent.

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CASES.

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THE AMERICAN SUGAR REFINING COMPANY,
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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

THE ISSUE IN THE CASE.

The substantial question presented on the complaint is a very narrow one, peculiar to New Jersey law and to corporations formed under that law prior to 1896. The corporation statutes of New Jersey until 1896 required a definite limitation to corporate life. The charter of each corporation organized under that law, consequently, contained a specified expiration date. The corporate life, however, could be extended under the New Jersey statutes for further definite periods. The respondent was organized prior to 1896 and its charter provided for expiration of the corporate existence on January 10, 1941. Appropriate action was taken within the corporation in 1940 to extend that date for fifty years. The petitioner, who is an owner of common stock of the respondent, voted against the extension. He has now sued to recover the liquidating value of his stock as of January 10, 1941. The only question, therefore, presented on the complaint is whether a

non-assenting stockholder in a pre-1896 New Jersey corporation, which votes an extension, becomes entitled to recover the liquidating value of his stock from the corporation, even though the corporate life is validly extended.

The Question Presented by the Petition for Certiorari.

The District Court dismissed the action without prejudice through an application of the rule of *forum non conveniens*. On appeal this was affirmed by the Circuit Court for the First Circuit (139 F. (2d) 79). The reasons assigned for allowance of the petition are diffuse and confusing, but apparently they can be reduced to the proposition that: Admitting that a court of equity might properly dismiss a bill through application of the doctrine of *forum non conveniens*, a District Court of the United States cannot apply that doctrine to an action which in essence is an action at law in which the right of jury trial is guaranteed by the Constitution.

The Decisions of the Lower Courts were Correct.

The Law of Massachusetts Required the Dismissal.

Prior to the institution of the action, it was settled that under the law of Massachusetts the petitioner could not prosecute an action in a Massachusetts court to recover the liquidating value of his shares under the circumstances disclosed in the complaint.

> *Kelley* v. *American Sugar Refining Company*, 311 Mass. 617.

That case was a prior attempt by this petitioner to recover on this cause of action. In view of this decision, there

could be no question that, as far as Massachusetts law is concerned, the doctrine of *forum non conveniens* applied to the facts disclosed in this case.*

The fact that the Massachusetts case was a bill in equity is wholly immaterial. Massachusetts draws no distinction between equity and law as far as application of *forum non conveniens* is concerned.

Universal Adjustment Corp. v. *Midland Bank, Ltd.*, 281 Mass. 303.

The Law Applied in the Federal Courts Likewise Required Dismissal.

Under the decisions of this Court, the District Court was required to decide the case according to Massachusetts law.

Erie Railroad v. *Tompkins*, 304 U.S. 64.
Klaxon Co. v. *Stentor Electric Mfg. Co.*, 313 U.S. 487.

In any event, there is no diversity between the Massachusetts rule and the rule followed by the Federal courts prior to the decision in the *Erie* case. This Court has applied the rule of *forum non conveniens* quite as consistently as the Supreme Judicial Court of Massachusetts.

Rogers v. *Guaranty Trust Company*, 288 U.S. 123.

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*The decision in the *Kelley* case is the last of a long line of Massachusetts cases which uniformly apply the rule in cases relating to intra-corporate disputes. See *Smith* v. *Mutual Life Insurance Company of New York*, 14 Allen, 336, 343; *New Haven Horse Nail Co.* v. *Linden Spring Co.*, 142 Mass. 349, 353; *Pierce* v. *Equitable Life Assurance Society*, 145 Mass. 56, 63; *Richardson* v. *Clinton Wall Trunk Mfg. Co.*, 181 Mass. 580, 582; *Kling* v. *McTarnahan*, 277 Mass. 386, 390; *Wason* v. *Buzzell*, 181 Mass. 338, 339; *Kimball* v. *St. Louis & San Francisco Railway*, 157 Mass. 7.

Also, like the Massachusetts court, the Federal courts do not draw a distinction between law and equity in this particular. The Federal courts applied the rule to actions at law prior to the abolition of the distinction between the two forms of procedure.

> *Heine* v. *New York Life Insurance Company*, 45 F. (2d) 426 (D.C. Ore.); 50 F. (2d) 382 (C.C.A. 9).

This lower court case was cited with complete approval by this Court in the opinion in the *Rogers* case (288 U.S. at 131).

No Constitutional Point is Involved.

The petitioner's endeavour, apparently, is to make it appear that the constitutional right to trial by jury has been denied him. This is not so. The dismissal without prejudice on grounds of *forum non conveniens* no more denies the right to trial by jury than would a similar dismissal without prejudice on grounds of improper venue. The constitutional guarantee relates to the mode of trial in a case which it is appropriate should be tried; it has nothing to do with the underlying question of whether a particular case can be prosecuted in a particular court. If the petitioner should bring his action in the District Court in the District of New Jersey, where the rule of *forum non conveniens* would not apply, he would have a clear right to a jury trial, assuming that his action really is in the nature of an action at law. But until he institutes an action in a court which is properly open to him and to that action, no question can arise as to his right to trial by jury.

Conclusion.

None of the reasons ordinarily deemed sufficient to move this Court to grant certiorari is presented in this case. There is no conflict between the Circuits. The Circuit Court of Appeals followed the Massachusetts cases and did not decide any question of local law so as to conflict with applicable local decisions. No important question of Federal law is presented which has not been settled by this Court. This Court has already settled the law relating to *forum non conveniens*. There has been no decision on any Federal question which could conflict with applicable decisions of this Court. There has been no departure from the accepted and usual course of judicial proceedings. Furthermore, the point involved in the case is one of minute application and not one of general interest in the law. The supposed constitutional question put forward by the petitioner is without substance. Indeed, the petitioner's present insistence on a jury trial would seem to be a clear afterthought, in view of the fact that, when he first sued in the state court, he saw fit to proceed on the equity side, where he could not have a jury, although he could quite as well have brought an action at law, in which Massachusetts would guarantee him a jury quite as fully as would the Federal Constitution.

The decision of the Circuit Court of Appeals was clearly right and there are substantial reasons, some of which are stated in the opinion of the Circuit Court of Appeals, why the case should not be tried outside of New Jersey. The case is not one which should move this Court to take jurisdiction, and we urge that the petition be denied.

Respectfully submitted,

JOHN L. HALL,
RICHARD WAIT.